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ORAL PRESENTATION OF EVIDENCE AND THE APPLICATION OF THE PAROL EVIDENCE RULE IN INTERNATIONAL ARBITRATION

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I. INTRODUCTION

With the judgment T 6238-10, dated February 24, 2012, by the Svea Court of Appeal, the appellate court in Stockholm upheld an award challenged on the grounds that the arbitrator had, against one party's request, conducted the arbitral proceeding without an evidentiary hearing.[1] In addition, extrinsic evidence submitted had been rejected by the arbitrator by reference to the Parol Evidence Rule under New York law. The decision by the Svea Court of Appeal confirms that parties, under Swedish law, may in advance of a dispute bind themselves to "documents only" arbitration. This article discusses two issues, first, whether there is a right to an oral hearing and second, the application of the Parol Evidence Rule in international arbitration.

The factual and procedural background of the case and the decision by the Svea Court of Appeal are set forth in the next sections, followed by a discussion on the right to an oral hearing and a subsequent examination of the application of the Parol Evidence Rule in international arbitration.

II. THE FACTUAL AND PROCEDURAL BACKGROUND OF THE CASE

By a final award dated February 10, 2003, Viva Trade L.L.C. ("Viva Trade") was ordered to pay a certain amount to Rual Trade Limited ("Rual Trade"). Subsequently, Rual Trade sought to enforce the award against Viva Trade, Roman Romanov, Vladimir Romanov and Ukio Banko Investicine Groupe ("Ukio Banko"). In April 2007, Rual Trade entered into a settlement agreement with Viva Trade, Roman Romanov, Vladimir Romanov and Ukio Banko (together referred to as the "Defendants" in the settlement agreement).[2]

The settlement agreement provided that the defendants were "jointly and severally liable to pay, and agree to pay, or cause to be paid" to Rual Trade three million U.S. dollars in four installments.[3]

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[1] Judgment T 6238-10, dated Feb. 24, 2012, by the Svea Court of Appeal, *available at* http://www. skiljedomsforeningen.se/file/hovr-ordre-public-t-2010-6238.pdf.

[2] *Id*. at 1.

[3] *Id*. at 3.

The settlement agreement contained an arbitration clause stipulating that disputes "arising out of or in connection with" the settlement agreement should be settled by arbitration seated in Stockholm in accordance with the Rules for Expedited Arbitrations of the Arbitration Institute of the Stockholm Chamber of Commerce ("SCC Rules for Expedited Arbitrations"). The settlement agreement was governed by the substantive law of the state of New York. Further, the settlement agreement also included a "merger clause" that limited the settlement agreement to "the terms expressly set forth therein."[4]

Only the first installment was paid. As a consequence, Rual Trade initiated expedited arbitral proceeding against the defendants requesting payment of the outstanding installments.[5]

The Arbitration Institute of the Stockholm Chamber of Commerce appointed a sole arbitrator. In the first procedural order issued by the sole arbitrator, he ordered that "a hearing will only be held if requested by a party and deemed necessary by the Arbitrator (Article 27 SCC Rules for Expedited Arbitrations). Otherwise the decision will be rendered by written procedure."[6]

In the arbitration, Viva Trade admitted its obligation to cover all outstanding amounts due under the settlement agreement. The other defendants rejected the claim and claimed that they were only liable if Viva Trade, due to bankruptcy, could not pay the whole settlement amount. They submitted witness statements in support of this claim and requested that the witnesses be summoned to an oral hearing. Rual Trade objected to the holding of an oral hearing. In his fourth procedural order, the sole arbitrator denied the request for an oral hearing with reference to Article 27 of the SCC Rules for Expedited Arbitrations,[7] stating that the tribunal "after carefully considering the hitherto existing submissions of the parties and in particular the Witness Statements . . . [d]oes not think it necessary to call for an oral hearing and to summon witnesses in order to finally resolve the dispute."[8]

In his decision on the merits the sole arbitrator found the defendants jointly and severally liable to the claimant. In the award the sole arbitrator excluded the witness statements submitted by the defendants regarding the contract negotiations pursuant to the Parol Evidence Rule which, in general terms excludes admission of extrinsic evidence of a prior agreement that contradicts a later writing. The sole arbitrator held that the Parol Evidence Rule "is a rule of substantive law and not merely a rule of evidence" under New York law and that the rule applied to the case at hand.[9]

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[4] *Id*.

[5] *Id*. at 4.

[6] *Quoted in id*. at 4.

[7] SCC RULES FOR EXPEDITED ARBITRATIONS, Art. 27(1) ("A hearing will be held if requested by a party and if deemed necessary by the Arbitrator").

[8] *Quoted in* Judgment T 6238-10, *supra* note 1, at 5.

[9] Judgment T 6238-10, dated Feb. 24, 2012, by Svea Court of Appeal, Appendix D "Final Award", *available at* http://www.skiljedomsforeningen.se/file/rual-trade-ltd-vs-viva-trade-llc-mfl.pdf.

III. THE DECISION BY THE SVEA COURT OF APPEAL

Roman Romanov, Vladimir Romanov and Ukio Banko requested that the Svea Court of Appeal annul the arbitral award[10] and alternatively requested that the court set aside[11] the award with respect to them due to the sole arbitrator's decision not to allow an oral hearing. The claimants alleged that the decision not to hold an oral hearing and to deny witness examination was in violation with the basic principles of the Swedish legal system (*ordre public*) and constituted a procedural irregularity that probably influenced the outcome of the case.

The Svea Court of Appeal dismissed the challenge. The court started its analysis by stating that if a substantive issue has been wrongly assessed, no challengeable irregularity has been committed. The court noted that incorrect dismissal of evidence is a challengeable procedural issue. The court further noted that the parties had been represented by counsel, and had agreed that disputes should be settled by arbitration in accordance with the SCC Rules for Expedited Arbitrations. The court stated that the parties had agreed on the application of New York law as the substantive law and held that the parties must have been aware at the time of entering into the settlement agreement that the Parol Evidence Rule may exclude the admission of extrinsic evidence.

The court held that the proceedings had been conducted in accordance with the procedural rules chosen by the parties and that neither the procedural rules nor the application of these rules were unfamiliar to the Swedish legal system. For these reasons, the Svea Court of Appeal concluded that the arbitral proceedings were not incompatible with the basic principles of the Swedish legal system and that the sole arbitrator had not committed any procedural error in violation of the SCC Rules for Expedited Arbitrations when deciding not to allow an oral hearing and to exclude the oral evidence submitted.

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[10] Section 33(1) Paragraph 2 of the Swedish Arbitration Act (1999) provides that "an award is invalid if the award, or the manner in which the award arose, is clearly incompatible with the basic principles of the Swedish legal system." English translation of the Swedish Arbitration Act provided by the Arbitration Institute of the Stockholm Chamber of Commerce, *available at* http://www.sccinstitute.com/the-swedish-arbitration-act-sfs-1999121.aspx.

[11] Pursuant to Section 34(1) Paragraph 6 of the Swedish Arbitration Act (1999), an award may be set aside upon motion of a party if, without fault of the party, there otherwise occurred an irregularity in the course of the proceedings which probably influenced the outcome of the case.

IV. COMMENTS

A. *No Absolute Right to an Oral Hearing*

"It has been said many times that the only thing wrong with 'documents only' arbitrations is that there are not enough of them."[12] In response to the criticism from the international business world of increasing costs and delay associated with international arbitration, there has been a trend in the last two decades to reduce the length of evidentiary hearings and the oral features of the arbitration proceedings.[13] Nevertheless, proceedings in "ordinary" international arbitrations usually involve at least a brief hearing, allowing the parties to present legal arguments and, in particular, for witness testimony to be conducted.[14] The practice of oral hearings is confirmed by the major international arbitration rules.[15]

A parallel response to the criticism related to time and costs of international arbitration adopted by arbitration institutions such as the AAA, SCC, WIPO, CIETAC and the Swiss Chambers' Arbitration Institution has been to offer simplified procedural rules. As might be expected, these simplified procedures differ in various ways, but a common denominator is that they all provide that an evidentiary hearing is optional.[16]

The decision by the Svea Court of Appeal, confirming that the parties in this case could, in advance of the dispute, bind themselves to a "documents only" arbitration, is undoubtedly in accordance with the laws of Sweden. Although, the Swedish Arbitration Act affords a right to an oral hearing, it follows from the wording of Section 24 of the Swedish Arbitration Act that the parties may agree to conduct arbitration without holding a hearing.[17] Clearly, a notable limitation on party autonomy in this respect is that the parties should be afforded proper

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[12] NIGEL BLACKABY, CONSTANTINE PARTASIDES, ALAN REDFERN & MARTIN HUNTER, REDFERN AND HUNTER ON INTERNATIONAL ARBITRATION § 6.182 (5th ed. 2009).

[13] 2 GARY BORN, INTERNATIONAL COMMERCIAL ARBITRATION 1848 (2009).

[14] BLACKABY ET AL., *supra* note 12, § 6.183.

[15] *See, e.g.*, the UNCITRAL ARBITRATION RULES, Art. 15(2), ICC RULES, Art. 20(6), LCIA RULES, Art. 10. *See further* BORN, *supra* note 13, at 1831 and BLACKABY ET AL., *supra* note 12, § 6.184.

[16] *See* AAA COMMERCIAL ARBITRATION RULES & MEDIATION PROCEDURES, EXPEDITED PROCEDURES, E-6 (Proceedings on Documents), the SWISS RULES OF INTERNATIONAL ARBITRATION, Art. 42.1(6), CIETAC ARBITRATION RULES (effective as of May 2012), Art. 58, SCC RULES FOR EXPEDITED ARBITRATIONS, Art. 27.1 and WIPO EXPEDITED RULES, Art. 47.

[17] "The arbitrators shall afford the parties, to the extent necessary, an opportunity to present their respective cases in writing or orally. Where a party so requests, and provided that the parties have not otherwise agreed, an oral hearing shall be held prior to the determination of an issue referred to the arbitrators for resolution." SWEDISH ARBITRATION ACT (1999), Sec. 24(1). *See further* LARS HEUMAN, ARBITRATION IN SWEDEN: PRACTICE AND PROCEDURE 257 (2003).

procedural opportunities to present their case.[18] The requirement of due process cannot be excluded through agreement between the parties.[19] In its analysis, the Svea Court of Appeal did not explicitly discuss the question of whether the defendants were afforded proper opportunities to present their case. However, it is clear that the challenged decision to deny a request for an oral hearing was taken "after careful consideration of . . ., in particular, the witness statements." Thus, in my view, although the procedural decision limited the parties' ability to present oral evidence, the parties were afforded reasonable opportunities to present their case in writing.[20]

B. *The Parol Evidence Rule in International Arbitration*

The second question raised in this case was whether the decision not to allow witness examination constituted a procedural irregularity that probably had influenced the outcome of the case pursuant to Section 34 of the Swedish Arbitration Act.[21] The claimants argued that by excluding extrinsic evidence pursuant to the Parol Evidence Rule they were denied the opportunity to present their case. As set out above, the court dismissed the challenge, but the question calls for a closer examination of the treatment of the Parol Evidence Rule in international arbitration.

A comprehensive description of the Parol Evidence Rule is beyond the scope of this article. Basically, under the predominant view in the United States, the Parol Evidence Rule bars extrinsic evidence that contradicts a later writing.[22] Typically, the rule will apply to evidence of prior negotiations that contradict the terms of a written contract. If it is decided that the writing in question is incomplete (i.e. the agreement in question is not a complete and exclusive expression of all the terms the parties intended), extrinsic evidence may be introduced to complement a later writing but not to contradict the terms of the writing.[23] However, if the writing has completely integrated the parties' intentions, both evidence that contradicts and that which supplements the later writing are barred. In New York the question whether the contract will allow evidence "to add

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[18] HEUMAN, *supra* note 17, at 258. *Compare* Section 24(1) of the SWEDISH ARBITRATION ACT (1999). *See also* KAJ HOBER, INTERNATIONAL COMMERCIAL ARBITRATION IN SWEDEN ¶ 8.38 (2011).

[19] STEFAN LINDSKOG, SKILJEFÖRFARANDE – EN KOMMENTAR §24-4.1.5 (2nd ed. 2012).

[20] *See further* HEUMAN, *supra* note 17, at 257-58. *Cf.* the Swedish Appellate court decision RH 1987:121 where the court, applying the rules on admissibility of evidence in the Swedish Code for Civil Procedure, found that the arbitrator's decision to deny an oral examination of witnesses was a procedural irregularity that probably had influenced the outcome of the case.

[21] *See supra* note 11.

[22] UCC § 2-202. The Parol Evidence Rule is recognized in all common-law jurisdictions with some modifications. E. ALLAN FARNSWORTH, CONTRACTS 427 (3rd ed. 1999).

[23] FARNSWORTH, *supra* note 22, at 433.

or vary the writing,"[24] boils down to whether the meaning of the terms of the writing is set down "in a clear, complete document"[25] allowing for no ambiguity of its meaning. This summary of the rule does not provide for its full complexity, and increasingly common-law courts have allowed exceptions to admit extrinsic evidence.

The Parol Evidence Rule is subject to a "grey zone"[26] treatment in international arbitration, in between procedural and substantive issues.[27] The distinction between procedural and substantive issues is of considerable practical importance as an award generally may be challenged on procedural errors only. Under Article 34 of the Swedish Arbitration Act, an award may be set aside if a *procedural* irregularity occurred that probably influenced the outcome of the case. When an international arbitration is seated in Sweden it has been suggested that, as a general rule, Swedish law governs the classification of an issue as substantive or procedural.[28]

The conflicting classifications of the Parol Evidence Rule as a procedural or substantive issue in international arbitration are well illustrated in this case. Under New York law, the Parole Evidence Rule is a rule of substantive law.[29] This was confirmed by the sole arbitrator in the award. However, the Parol Evidence Rule's evidentiary implication, for example controlling what evidence that may be invoked to substantiate an interpretation of a contract, opens up alternative choices of law. Under Swedish law, admissibility of evidence is treated as a procedural question governed by *lex arbitri* unless the parties have agreed differently or the close connection to the applicable substantive law justifies that substantive law be applied.[30] This indicates that the distinction between procedural and substantive law with respect to admission of extrinsic evidence for contract interpretation is difficult to draw and may be dependent on how these questions play out in the particular case at hand.

In this case, the Svea Court of Appeal concluded that the decision not to hold the requested oral witness examination did not violate the SCC Rules for Expedited Arbitrations, but was silent on what choice of law governed the question of the exclusion of the witness statements pursuant to the Parol Evidence Rule. The court noted that erroneous dismissal of evidence is a challengeable decision. However, in its analysis the court held that the parties had agreed in advance of the dispute on New York law as the substantive law and had accepted

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[24] W.W.W. Associates, Inc. v. Giancontieri, 565 N.Y.S.2d 440, 442 (1990).

[25] *Id.* at 442.

[26] JULIAN D.M. LEW, LOUKAS A. MISTELIS & STEFAN M. KRÖLL, COMPARATIVE INTERNATIONAL COMMERCIAL ARBITRATION 559 (2003).

[27] *Id.*

[28] HEUMAN, *supra* note 17, at 673.

[29] Bersani v. General Accident Fire & Life Assurance. Corp., Ltd, 460 N.Y.S.2d 108 (1975). *See further* FARNSWORTH, *supra* note 22, at 428-30.

[30] HEUMAN, *supra* note 17, at 673 and MICHAEL BOGDAN, SVENSK INTERNATIONELL PRIVAT- OCH PROCESSRÄTT 71-72 (6th ed. 2004).

the application of the Parol Evidence Rule, suggesting that the exclusion of evidence pursuant to this rule may be treated as a substantive law issue where the court should defer to the arbitrator's assessment. In my view these questions must be decided on a case-by-case basis. In this case, considering the close connection between the admissibility of evidence pursuant to the Parol Evidence Rule and the contract interpretation, it is reasonable that exclusion of evidence pursuant to the Parol Evidence Rule falls outside the court's review as long as the parties are afforded a reasonable opportunity to present their case.[31]

Although the Svea Court of Appeal found that no procedural irregularity had occurred, another question, outside the court's review, is whether it is *appropriate* for an arbitral tribunal to apply the Parol Evidence Rule in international arbitration. Commentators on international arbitration have criticized the application of strict national rules on the admissibility of evidence in international arbitration.[32] The rationale of the criticism is that national rules on the admissibility of evidence have been developed, and may make sense, in a national court system, but may be less motivated in an international arbitration context.[33] For example, the Parol Evidence Rule was traditionally developed in the common-law system as a way to formalize and control the evidence that may be assessed by a jury.[34] Such considerations have no bearing in international arbitration. Further, in international arbitration, predictability and equality between the parties will require that the arbitrator decide evidentiary matters in a manner that meets the parties', not seldom, conflicting expectations on, in particular, the resolution of evidentiary questions.[35] Consistent with this, institutional arbitration rules, including the SCC Rules for Expedited Arbitrations,[36] often afford the arbitrator wide discretion to determine the admissibility and weight of the evidence.[37] When exercising this discretion, in practice, international arbitrators appear to avoid applying national rules on the exclusion of evidence.[38]

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[31] *Cf.* HEUMAN, *supra* note 17, at 629 (suggesting that issues of admissibility of evidence, even if taken as part of a substantive law decision may be procedurally challengeable).

[32] BORN, *supra* note 13, at 1851-56. *See also* Laurent Lévy, *Conclusions*, *in* ARBITRATION AND ORAL EVIDENCE 143-47 (Laurent Lévy & V.V. Veeder eds., 2004).

[33] BORN, *supra* note 13, at 1851-53.

[34] FARNSWORTH, *supra* note 22, at 429, with reference to Arthur Corbin, *The Parol Evidence Rule*, 53 YALE L.J. 603, 608-09 (1944) and Countess of Rutland's Case, 77 Eng. Rep. 89, 90 (K.B. 1604).

[35] DAVID D. CARON, LEE M. CAPLAN & MATTI PELLONPÄÄ, THE UNCITRAL ARBITRATION RULES: A COMMENTARY 56 (2006). *Compare* Lévy, *supra* note 32, at 143-44.

[36] SCC RULES FOR EXPEDITED ARBITRATIONS, Art. 26(1).

[37] BORN, *supra* note 13, at 1851-52.

[38] *Id.* at 1852. *See further* Lévy, *supra* note 32, at 144 and CARON, CAPLAN & PELLONPÄÄ, *supra* note 35, at 622.

In light of the criticism[39] and confusion[40] that the Parol Evidence Rule has generated domestically in common-law jurisdictions and considering that its formalized approach may conflict with the expectations of parties accustomed to the more liberal evidentiary tradition of civil-law jurisdictions,[41] it should, in my view, be applied with caution in international arbitration.[42] It is, however, wrong to argue that arbitrators may simply disregard the Parol Evidence Rule, as it is a rule of substantive law in common-law jurisdictions. Ultimately, and importantly, these questions need to be decided with careful attention to the parties' agreement and with adherence to the principles of party autonomy.[43] In this arbitration, it seems clear that the parties had agreed on the application of the Parol Evidence Rule. In contrast, when a contract is interpreted pursuant to generally accepted maxims of contract, rather than with reference to national contract law, extrinsic evidence of the parties' intentions should be admitted.[44] Under this approach the ordinary subjective intention of the parties should be given effect and this necessitates that evidence of such subjective intentions be admitted.

Provided the parties' agreement allows this, an alternative resolution of evidentiary questions in an international setting is to assess the relevance, materiality and weight of the prior negotiations of a written instrument.[45] Policy considerations supporting the Parol Evidence Rule, such as providing certainty of terms, may be accommodated when assessing the relevance of the evidence in question.[46] For example, even with the application of the more subjective method of contract interpretation and admission of extrinsic evidence found in civil-law jurisdictions, arbitral tribunals tend to give primary effect to the written terms of a contract and afford less weight to drafts or other evidence of contract negotiations not expressed in the final contract.[47] Ultimately, the Parol Evidence Rule should

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[39] *See* CHRISTOPH BRUNNER, FORCE MAJEURE AND HARDSHIP UNDER GENERAL CONTRACT PRINCIPLES: EXEMPTION FOR NON-PERFORMANCE IN INTERNATIONAL ARBITRATION 29, n.155 (2008).

[40] *See* FARNSWORTH, *supra* note 22, at 428.

[41] For example, the clear wording of a contract clause does not exclude a Swiss court from considering extrinsic evidence when assessing whether the parties' intentions are different from that expressed in the contract. BRUNNER, *supra* note 39, at 29, with reference to BGE 127 III 444, 445 (2001). Further, under Chapter 35, Section 1, of the Swedish Code of Judicial Procedure, a Swedish court may evaluate everything that has occurred in the proceeding, including evidence concerning negotiations preceding a written agreement.

[42] There is legal authority under New York law suggesting that an arbitrator is not bound by the Parol Evidence Rule. Lentine v. Fundaro, 328 N.Y.S.2d 418, 421-22 (NY 1972).

[43] *Compare* HEUMAN, *supra* note 17, at 681.

[44] Joshua D.H. Karton, *International Commercial Arbitrators' Approaches to Contractual Interpretation*, 4 INT'L BUS. L.J. 383, 384 (2012).

[45] CARON, CAPLAN & PELLONPÄÄ, *supra* note 35, at 622.

[46] *Compare id*.

[47] *See* Karton, *supra* note 44, at 400.

render the same result as a subjective evidentiary assessment found in civil-law jurisdictions, as the Parol Evidence Rule at its core is a formalized assessment of what is relevant evidence.[48] Further, also under the more subjective approach set out in, for example, the IBA Rules on the Taking of Evidence, evidence may be rejected because of a lack of relevance.[49] The difference in practice is that a more subjective evidentiary assessment naturally allows the arbitrator flexibility to tailor the resolution of the evidentiary questions to the needs of the specific arbitration at hand.[50]

V. CONCLUSIONS

This article concerns two issues related to the use of the discretionary powers afforded arbitrators under the SCC Rules for Expedited Arbitrations. First is the question of whether there is a right to an oral hearing. We can conclude that there is no absolute right to an oral hearing under Swedish law provided the parties are afforded proper procedural opportunities to present their case in writing.

Second, the article considered the question whether exclusion of evidence pursuant to the Parol Evidence Rule should be considered a procedural decision that is a ground for challenge of an award. In my view this question must be decided on a case-by-case basis. In this case, is it reasonable that these issues fall outside the court's review, considering the close connection between the admissibility of evidence pursuant to the Parol Evidence Rule and the contract interpretation, as long as the parties are afforded a reasonable opportunity to present their case. This solution has the benefit of avoiding a situation where the court is required to assess the relevance of evidence that is closely connected to the contract's interpretation, an unfortunate situation which would allow for discontented parties to obtain a court's review of the arbitral tribunal's decision on the merits.

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[48] *See* Jan Hellner, *The Parol Evidence rule och tolkning av skriftliga avtal i svensk rätt*, *in* FESTSKRIFT TILL BERTIL BENGTSSON 186 (1993). *See also* Karton, *supra* note 44, at 384.

[49] IBA RULES ON THE TAKING OF EVIDENCE IN INTERNATIONAL COMMERCIAL ARBITRATION, Art. 9(1).

[50] Lévy, *supra* note 32, at 145.